

IN THE MATTER OF	:	BEFORE THE
<b>MARTY A. HOWARD</b>	:	HOWARD COUNTY
<b>T/A H &amp; H LANDSCAPING</b>	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 16-028C&V

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**DECISION AND ORDER**

On March 13 and July 10, 2017, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petitions of Marty A. Howard for four variances and expansion of a Home-Based Occupation - Landscape Contractor conditional use, in an RR-DEO (Rural Residential: Density Exchange Option) zoning district, filed pursuant to §§ 131.0.N.32 and 131.0.B.2 of the Howard County Zoning Regulations (HCZR). The four variances requested are:

- Reduce the side setback from 10 feet to 3 feet for an existing residential accessory storage shed identified as Building "C".
- Reduce the side setback from 30 feet to 11 feet for an existing residential accessory storage shed identified as Building "P".
- Reduce the side setback from 30 feet to 18 feet for an existing residential accessory storage shed identified as Building "E".
- Increase the lot coverage of accessory structures for residential use from the permitted 2,200 square feet to 3,189 square feet for existing residential accessory storage sheds and an existing residential accessory garage, identified as Buildings "C", "E", and "F" on the plan submitted with the petition.

The Petitioner certified to compliance with the advertising and posting requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Bradley Farrar, Esq. represented the Petitioner. Marty Howard and Carl Guttschick testified in support of the petition. Thomas Coale, Esq., represented the

Hunterbrooke Homeowners Association, Inc. and Christopher Nowalk in opposition to the petitions.

The 5.11-acre subject property is located in the 5<sup>th</sup> Election District on the southeast side of Hunterbrooke Lane approximately 875 feet south of Lime Kiln Road. It is identified as Tax Map 0046, Grid 0001, Parcel 344 and known as 8045 Hunterbrooke Lane (the Property.)

### **Zoning History**

BA 92-31E&V. The Board of Appeals granted petitioners Bruce and Kathleen Phillips a Special Exception for a landscape contracting business and a variance to reduce the required 30 foot side setback to 25 feet for an existing garage on December 17, 1992, including a 1,200sf office building, a 1,500sf storage garage, and a 4,500sf gravel parking area for the conditional use, subject to five conditions: 1. Petitioners shall comply with all applicable Federal, State and County laws and regulations; 2. The driveway between the subject property and Lime Kiln Road shall be upgraded in accordance with the requirements of the Department of Public Works and the Department of Fire and Rescue Services; 3. A sight distance analysis shall be submitted as a part of the site development plan; any necessary improvements to the intersection of the driveway with Lim Kiln Road shall be as required by the Department of Public Works; 4. Petitioners shall plant landscape buffering as indicated on the special exception plan, and; 5. Petitioners shall comply with testimony and extend the driveway past the existing garage to serve the proposed special exception office and storage garage, and the driveway extension shall comply with the fifty (50) foot use and parking setback for landscape contractors.

CB 11-2001 (ZRA 30) modified the landscape contractor conditional use category in then HCZR § 130.48 to require setbacks for buildings and outdoor areas to be used for parking, loading and storage of vehicles, equipment, tools and supplies to at least 100 feet from lot lines and public roads. The TSR reports those portions of the use approved in BA 92-31E&V within this 100 foot setback became legally noncomplying.

Waiver Petition 93-47 to waive the site development plan requirement granted by the Department of Planning and Zoning on November 3, 1992.

CE 15-172. Action: Formal notice issued February 8, 2016 for the development and use of a landscape contractor business not in compliance with approved Board of Appeals case 92-31E&V on RR zoned property and maintenance of accessory structures with a maximum lot coverage exceeding 2,200 square feet on RR zoned property. Status: Open.

Protestants introduced into evidence these exhibits.

- A. 1998 county aerial photograph of Property
- B. 2004 county aerial photograph of Property

- C. 2011 county aerial photograph of Property
- D. 2013 county aerial photograph of Property
- E. 2016 county aerial photograph of Property
- F. Photograph showing 13 vehicles parked along the conditional use driveway
- G. Photograph of Property from adjoining lot

### **A Preliminary Matter**

At the outset of the March 13, 2017 hearing, the Hearing Examiner informed Petitioner she was obliged to continue the hearing for two reasons. First, the Department of Planning and Zoning (DPZ) issued its technical staff report (TSR) on March 6, 2017, only 7 days before the March 13, 2017 hearing, violating the Howard County Code § 16.801(c)(7) mandate to DPZ to issue TSRs 2 weeks prior to any public meeting or hearing.<sup>1</sup> Second, the conditional use & variance plan/petition lacked certain information necessary to evaluate it. By letter of April 4, 2017, the Hearing Examiner instructed Petitioner to amend the conditional use/variance petitions/supplement/plan as follows.

1. Depict the total physical boundary of the proposed conditional use site. This area includes the conditional use driveway. Note the total square footage of the conditional use, including the driveway. Denote the driveway use setback.
2. Call out all structures approved in BA 92-031E&V. Call out that portion of Building G approved in BA 92-031E&V (See TSR, pg. 8.), as clarified/corrected in the technical staff report, p. 8.
3. Call out expanded structures, additions or new structures erected without conditional use expansion approval and for which Petitioner is requested retroactive approval in BA 16-028C&V.
4. Clearly depict/identify all structures, their size, height, and total square footage.
5. Call out the location of the 4,500sf parking area approved in BA 92-031E&V, which, according to the TSR in that case was located the parking area in the southeast corner of the site. See p. 7 of the BA 16-028C&V TSR.

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<sup>1</sup> HCC § 16.801(c)(7) supersedes in pertinent part HCZR § 131.0.F.3.a, which states, "[t]he Department of Planning and Zoning shall transmit its findings and recommendations concerning a Conditional Use petition to the Hearing Authority at least 7 days prior to the public hearing on a petition, provided, however, the Hearing Authority may reduce or waive this requirement in advance."

6. Call out the proposed square footage and area of the proposed expanded parking area.
7. Note the total area and location to be used for parking and storage of commercial vehicles, equipment, materials, and supplies, whether exterior or interior, and the lot percentage of this area. Depict parking stalls for these vehicles.
8. Identify in the narrative supplement/conditional use plan the type and number of employee vehicles. Depict parking stalls for these vehicles.
9. Update the narrative supplement to include a narrative addressing all changes.
10. Update the conditional use petition/plan/narrative supplement as may be further required.
11. Amend the variance petition as necessary.

At the July 10, 2017 hearing, Petitioner introduced into evidence Petitioner Exhibit 1, an amended conditional use/variance plan (the July 10, 2017 Amended Plan, or Amended Plan) incorporating some of the information the Hearing Examiner requested. Notably, the Amended Plan and written summary accompanying the Amended Plan reference a 3-page Amended Plan, but Petitioner did not introduce pgs. 2 and 3 into evidence as part of Exhibit 1. (Petitioner provided the Hearing Examiner and opposition counsel a courtesy copy of the 3-page Amended Plan before the continuation hearing.) The changes identified on the Amended Plan include:

1. Total physical boundary of approved and current conditional use site limits and their respective areas are identified, delineated, and labeled on newly added sheet 3 as a dashed magenta line. Driveway use setback is denoted on sheet 1.
2. Original unmodified building footprints, including Building G and parking and storage areas as described and approved in BA 92-031E&V are identified, delineated, and labeled on newly added sheet 3.
3. Expanded structures, additions or new structures erected, and expanded parking and storage gravel areas created or modified after approval in BA 92-031E&V are identified, delineated, and labeled on newly added sheet 3.
4. Building labels have been augmented to improve identification. For the purpose of clarity size, height, and total square footage of all structures have been provided in tabular format on sheet 1.
5. The location of the 4,500sf parking area approved in BA 92-031E&V is identified, delineated, and labeled on newly added sheet 3.

The Hearing Examiner determined the hearing could proceed because the amendments were not substantive pursuant to Hearing Examiner Rules of Procedure 9.4 and 9.5.

At the conclusion of Carl Guttschick's testimony, opposition counsel Thomas Coale

motioned for dismissal of the petition, arguing the July 10, 2017 Amended Plan could not be approved because it does not accord with certain standards for the conditional land use category. Upon consideration of this motion and the evidence of record, I determined to grant the motion and deny the petition.

### **The July 10, 2017 Amended Plan**

HCZR § 131.0.N.32 contains the specific standards for Home-based Landscape Contractor conditional uses. Of import to the Hearing Examiner's determination to deny the petition are HCZR §§ 131.0.N.32.b & g.

- b. Buildings and outdoor areas to be used for parking, loading and storage of vehicles, equipment and tools and supplies shall be delineated on the Conditional Use plan and located at least 100 feet from lot lines and public roads.**
- g. The area used for parking and storage of commercial vehicles, equipment, materials and supplies, whether exterior or interior, shall be limited to no more than 5% of the area of the lot.**

Also of import is HCZR § 130.0.B.2.a(5), which regulates the Hearing Examiner's authority to grant variances and expressly bars her from granting variances to the minimum criteria of the conditional use categories contained in HCZR § 131.0, including variances from HCZR §§ 131.0.N.32.b & g. (Petitioner did not request variances from HCZR §§ 131.0.N.32.b & g.)

**That no variance be granted to the minimum criteria established in Section 131.0 for Conditional Uses except where specifically provided therein or in an historic district. Nothing herein shall be construed to prevent the granting of variances in any zoning district other than to the minimum criteria established in Section 131.0.**

The Amended Plan depicts portions of the proposed expanded building/outdoor Landscape Contractor use area regulated under HCZR § 131.0.N.32.b within the 100-foot setback. Because HCZR § 130.0.B.2.a(5) prohibits variances to this setback, the conditional use petition must be denied. The TSR reports the approval of a 4,500sf parking area in BA 92-31E&V;

however, the TSR in that case identified this parking area as proposed for the southeast corner of the site within the then 50-foot setback. The TSR further reports portions of the existing parking area constructed about 2007 in the southwest corner of the proposed conditional use site, violating the 100-foot setback.

The Amended Plan provides these existing/proposed parking and storage square footage calculations for the expanded, total conditional use site.

Previously approved interior storage area (Building G):	1,600
Previously approved exterior parking storage area:	4,500
Proposed expanded exterior parking area:	<u>16,150</u>
Total parking/storage area of lot	22,250
Total sf of 5.11-acre Property	220,047
5% of total Property square footage	11,125
Total proposed square footage for parking/storage	22,250
<b>Total percentage for parking/storage</b>	<b>10.1%</b>

Not included in this calculus is the area of the long driveway seen in Opposition Exhibit F. The driveway is part of the conditional use site. The Hearing Examiner's April 4, 2017 letter to Petitioner instructed him to amend the plan to depict the total physical boundary of the proposed conditional use site, explaining this area includes the conditional use driveway. Because the total proposed maximum conditional use square footage for the 5.11-acre Property is 22,250sf, or 10.1% of the 5.11-acre Property, double the 5% maximum imposed by HCZR § 131.0.N.32.g - even excluding Landscape Contractor driveway use area - the Hearing Examiner must deny the conditional use petition. There is a discrepancy between the stated square footage of Building "G" approved in BA 92-31E&V and the July 10, 2017 Amended Plan. The 1992 approval was for a 1,500sf storage structure, but the building data table on the Amended Plan states it is 1,606sf.

Moreover, the Amended Plan shows the driveway use located 16.5 feet from the side lot line, but it does not depict the applicable 30 foot use lot line setback imposed by HCZR § 105.0.E.5; Petitioner disregarded the Hearing Examiner's April 4, 2007 letter instruction to "amend the variance petition as necessary." Also within this 30-foot use setback is a portion of the parking area use in front of Buildings "B" and "C". The Amended Plan does not depict these use areas and their location as approved BA 92-31E&V, which would potentially make them legally noncomplying for the use as approved in 1992, but subject to variance approval with the proposed expansion of the Landscape Contractor use.<sup>2</sup> The Hearing Examiner discussed the driveway use and setbacks with Petitioner at the March 13, 2016 hearing, referencing BA 16-016C&V, where the Hearing Examiner granted that petitioner's Landscape Contractor conditional use petition and variances for the conditional use driveway because the driveway's square footage was called out on the conditional use plan as part of the conditional use site. The Hearing Examiner gave Mr. Howard's counsel a copy of the BA 16-016C&V decision and order for guidance. The Amended Plan also appears to misidentify the westerly 200sf+ accessory structure side setback as 25 feet, not 30 feet, as is shown for the easterly side setback.

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<sup>2</sup> HCZR 128.0.B.1 & 2, Noncomplying Structures and Uses, permits a structure or use which does not comply with current bulk requirements, but which complied with the requirements in effect when it was constructed, to remain in place and may be maintained or repaired as necessary and requires additions to the use or structure to comply with current bulk requirements unless a variance is granted subject to certain exceptions not applicable to the petitions. Arguably, the long driveway was not a part of the 1992-approved conditional use site, as BA 92-31E&V approved a "driveway extension" past the existing garage (Building B on the Amended Plan) subject to the condition of approval that it comply with the 50-foot use and parking setback for landscape contractors. Thus, with the 2013 Comprehensive Zoning Regulations, a conditional use access driveway for a site within the interior of a property is part of a new or expanded conditional use site area.

In the interest of quasi-judicial efficiency, the Hearing Examiner in denying the conditional use petition makes no findings and conclusions of law going to the credibility of evidence about the use allocation of structures/land uses (residential/landscape contractor/other land use) on the Amended Plan. Neither does the Hearing Examiner make findings of fact or conclusions of law going to compliance with the HCZR § 131.0.B general standards for conditional uses or the additional HCZR § 131.0.N.32 standards applicable to the Landscape Contractor conditional use category. Nor does she evaluate the requested variances.

**ORDER**

Based upon the foregoing, it is this **31<sup>th</sup> Day of July 2017**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petitions of Marty A. Howard for four variances and expansion of a Home-based Landscape Contractor conditional use, in an RR-DEO (Rural Residential: Density Exchange Option) zoning district are hereby **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



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**Michele L. LeFavre**

**Date Mailed:** \_\_\_\_\_

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.